

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

To be argued by
William B. Gray

Docket No.

75-1316 B
4cc. P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

MICHAEL PROCAK,

Appellee

UNITED STATES OF AMERICA,

Appellant

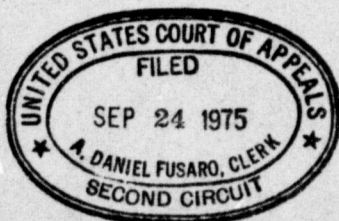
v.

SAMUEL DONALD KNIGHT,
a/k/a Michael Procak,
a/k/a Donald C. Parker,

Appellee

Appeal from the United States District
Court for the District of Vermont

REPLY BRIEF FOR THE UNITED STATES



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UNITED STATES OF AMERICA,)	Appellant
v.)	
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REPLY BRIEF FOR THE UNITED STATES

ARGUMENT

THE GOVERNMENT PROVED CONCLUSIVELY THAT
KNIGHT WAS ABSENT AND UNAVAILABLE FROM
MARCH 1, 1973 UNTIL DECEMBER 7, 1974.

Relying on United States v. Flores, 501 F.2d
1356, 1360 (2d Cir. 1974), and upon incomplete references
to the record, Knight argues that the Government failed
to establish that he was absent and unavailable from

approximately March 1, 1973 until December 7, 1974. The argument ignores the facts.

First, it should be noted that there never was a hearing directed to the issues presently contested by Knight on appeal. After a brief initial hearing at which the testimony of Special Agent Neil Lageman and defendant Samuel Donald Knight was received, the District Court initially sustained the Government's position in its Opinion and Order of February 11, 1975 (GA 31 - 39). At that time, the testimony focused on Knight's first arrest and his use of a false name. The subsequent dismissal of the indictments by the Court, first orally on June 6, 1975 (GA 4) and later in the Court's Opinion and Order, dated June 19, 1975 (GA 40 - 45), were based upon additional facts adduced at the trial of Knight on CR. NO. 74-101. Because the issues at that trial were not the same as those raised in the motion, the District Court twice sustained the Government's efforts to prove Knight's location and activities between March 1, 1973 and December 7, 1974 (R. 39, pp. 42 - 45, 77 - 78)*

* R. 39, a supplerent to the record was docketed on September 18, 1975 and contains transcripts of scheduled arraignment on January 29, 1973, the testimony of Samuel Knight and the real Michael Procak at trial on May 13, 1975, and the hearing on motion for reconsideration on August 4, 1975.

Nevertheless, there is in the record sufficient proof to support the Government's arguments. Indeed, the District Court noted that all contact with Mr. Knight was lost at some point following his arrest (A. 36). The proof showed this occurred soon after Knight went to Toronto.

Specifically, Knight quotes a small portion of Sergeant Rozmus' testimony as follows:

Q. "Do you recall if [Mr. Knight] gave you a telephone number or an address when he was here with you?"

A. "No, I can't remember that."

From this excerpt Knight argues that the Government failed to prove that Rozmus did in fact lose contact and that he did not have an address. Knight argues that Rozmus simply didn't remember whether or not he had a telephone number and address. A fair reading of the testimony, however, suggests that Rozmus intended to convey his belief that he did not receive a telephone number or an address from Knight. Other excerpts from Sergeant Rozmus' testimony make this clearer:

Q. "Did you ever try to contact him again?"

A. "No, I did not. As I recall, the way it was left when he had some information for me, that he would contact me. That

is, I believe - - I don't know if he had a place to stay or was in a position where I could contact him." (Tr. of May 13 at p. 72)(emphasis added)

* * * * *

Q. "And you had no way of contacting him either, did you?"

A. "That is correct. He didn't call back, and I didn't feel that any calls to anybody else were warranted." (Tr. of May 13 at p. 76)(emphasis added)

Indeed, Knight himself conceded during his testimony that he left Toronto after "a few months" and never advised any law enforcement agent of his address. (R. 39, pp. 42, 77)

Moreover, Sergeant Rozmus is not a representative of the United States Government. At most, Rozmus' knowledge of Knight's whereabouts might have provided an avenue for finding Knight if Knight was still in Toronto at the time. The Government had no authority to remove Knight from Canada if he had declined to appear as requested. The record does not show, nor does the Government have any way of proving, exactly when Knight left

Toronto. We do know from the record, however, that he was arrested more than a year later in Miami entering the United States from Jamaica using a false name. There can be no doubt that at least by the time he left Toronto Knight was absent from and unavailable at any address known to the Government or its agents.

At page 4 of his brief, Knight argues that he requested Agent Bowers' permission "to move" to Toronto to continue his investigations. Although the record does show that Knight suggested to Bowers that Knight go to Toronto to follow up on an investigation, there is no suggestion in the record that Bowers knew that Knight was moving to Toronto for any significant period of time. According to Knight's testimony, he went to Toronto primarily to see his wife for her birthday and not to do drug work (R. 39, p. 41). In fact, about the time Knight went to Toronto, Agent Bowers attempted to contact Knight in Montreal at a telephone number Knight had given him but was unable to reach him there (Tr. of May 13 at p. 58).

Knight's sole argument is that the Government failed to sustain its burden of proving when he became absent or unavailable, even though the record clearly establishes that at some time he was. Knight apparently does not contest the accuracy of the Government's computations of time or its legal theory.

The purposes of the District Court Plan are to meet the strong public interest in the administration of justice and not to provide defendants with additional procedural safeguards. See United States v. Lasker, 481 F.2d 229, 233 (2d Cir. 1973), cert. denied, 415 U.S. 975 (1974), United States v. Flores, supra, 501 F.2d 1360 n.4. These purposes are in no way served by granting Knight a windfall created by his own misconduct. Indeed, public confidence in the administration of justice would be shaken by such an unjust result. The proof in the record shows that by providing a false name and other misleading information Knight placed himself in a position where he could not be reached by normal channels of communication. The effect of Knight's position on appeal would be to charge the Government for the entire period of his absence merely because Government agents happened to meet with him in Canada on a few occasions after he had failed

to appear. Although he did meet on a few occasions with federal agents he thereafter moved to Toronto and there broke all contacts with law enforcement agents. Accordingly, he was absent and unavailable within the meaning of the District Court Plan until his return to Vermont on December 7, 1974. Accordingly, the intervening period should be excluded from computation and the orders dismissing the indictments should be reversed.

Respectfully submitted,

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Assistant United States Attorneys

September 23, 1975

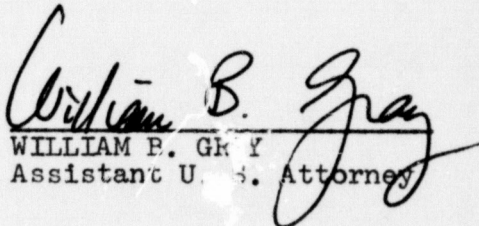
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CERTIFICATE OF SERVICE

I, William B. Gray, Assistant United States Attorney for the District of Vermont, do hereby certify that I served two copies of the foregoing REPLY BRIEF FOR THE UNITED STATES upon the Appellee by mailing same to his attorney of record, William K. Sessions, III, Esquire, 18 So. Pleasant Street, Middlebury, VT. 05753 this 23rd day of September, 1975.


WILLIAM B. GRAY
Assistant U. S. Attorney